

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 290 OF 2006

MR. AGNELO BARRETO AND ANR., ...Petitioners

Versus

MR. XAVIER FERNANDES AND ANR., ...Respondents

S.S.Kantak with Ms.Rakhi M. Chodankar
for the petitioner.

Ajit R. Kantak for the respondents.

Coram:- V.C.DAGA, J.

Date:- 27th July, 2006

P.C.

Rule, returnable forthwith.

Mr.A.R.Kantak waives service for the respondents.

By consent of parties, petition is taken up for final hearing and disposal.

Perused petition.

The petition is directed against the order dated 4th July, 2006 passed in Execution Application No.41/00/B by the Civil Judge, Senior Division, Panaji, whereby warrant of possession has been issued against the judgment debtors.

FACTS :

The factual matrix reveals that on 10th February, 2006, advocate of the judgment debtors reached little late in the Court and found that the matter was adjourned to 4th April, 2006. Advocate appearing for the judgment debtors, on 4th April, 2006, filed his appearance and sought time to file objections to the execution application. The matter came to be adjourned to 13th June, 2006.

On 13th June, 2006, it appears that petitioners/ judgment debtors sought further time to file reply, which was granted by the executing Court and the matter was adjourned to 4th July, 2006 at 2.30 for filing reply and arguments.

According to the petitioners, on 4th July, 2006 when the matter was called out, immediately after 2.30 p.m., the advocate appearing for the judgment debtors requested to keep the matter back so as to enable him to file reply as the affidavit in support thereof was to be sworn by judgment debtor No.1. It appears that the Court without granting the prayer made proceeded against the judgment debtors and directed issuance of the warrant of possession.

SUBMISSION :

The learned counsel appearing for the petitioner, during the course of hearing, submits that so far as claim of mundkarship to the suit premises is concerned, it can be raised in the execution proceeding in view of the law laid down by this Court in the case of Baburao Vishnu Naik v. Ramchandra Vishnu Naik & anr., 1989 (1) GLT (175). He, thus, submits that the petitioners are deprived of their rights to claim mundkarship to the tenament in question since they are denied right to file their objections.

Per contra, learned counsel appearing for the respondents/ decree holders submits that looking to the evidence of the petitioners, it is clear that the petitioners never wanted to claim to be the mundkar of the tenament in question. He, thus, submits that in view of doctrine of waiver they cannot be allowed to claim mundkarship in respect of the suit premises. The petitioners, thus, cannot be allowed to raise such plea sought to be raised in the petition or in the objections under section 47 of Code of Civil Procedure, 1908.

CONSIDERATION :

Having heard rival parties, it is not in dispute that the advocate appearing for the judgment debtors was little late when the matter was called out but, it appears that a specific request was made to the Court to keep the matter back so as to enable the judgment debtors to file their objections supported by affidavit. It appears that the executing Court without granting time and without receiving objections from the judgment debtors passed the impugned order on the very same day. In my considered view, the executing Court ought to have passed over the matter and ought to have permitted the judgment debtors to file their written objections.

In these circumstances, looking to the peculiar facts and circumstances of the case, it would be in the interest of justice to grant an opportunity to the judgment debtors to file their objection in the execution proceedings. At the same time, it would be open for the decree holders to contend that the objections do not survive in view of the evidence brought on record.

In the above view of the matter, the impugned order is quashed and set aside. The executing Court is directed to receive objections from the judgment debtors. The executing Court shall first consider the tenability of the objections raised by the judgment debtors. In the event, objections raised by the judgment debtors are found to be of any substance, then only, the executing Court shall proceed to deal with the objections filed by the judgment debtors on merits in accordance with law. Considering the chequered history of the litigation the executing Court is directed to decide the objections of the judgment debtors as expeditiously as possible, at any rate, within four weeks from the date of receipt of this order.

Both parties to appear before the executing Court on 3rd August, 2006, which has already been already fixed.

In the result, petition is allowed. Rule is made absolute in terms of this order. The costs is quantified in the sum of Rs.2,500/-, to be paid by the petitioners/ judgment debtors to the respondents/ decree holders within one week from today by depositing it in the Court below.

V.C.DAGA, J.

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